IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

Second Appeal No.115 of 2005
With
Civil Application No.218 of 2005

Shri Ankush Baburao Kawade — Appellant

Vs.

Shri Tanaji Shankar Jadhav & ors. — Respondents

Mr.N.V.Bandiwadekar for appellant.

Mr.S.S.Pakale for resp.nos.1 and 2.

Mr.P.D.Dalvi for resp.no.3.

Mr.S.N.Gawade, AGP for resp.nos.4 and 5.

CORAM: B.H.MARLAPALLE, J.

June 12, 2007.

P.C.

1. Heard Mr.Bandiwadekar, the learned counsel for the appellant, Mr.Pakale, the learned counsel for the respondent nos.1 and 2, Mr.Dalvi for respondent no.3 and the learned AGP appears for the respondent nos.4 and 5. Perused the affidavit filed by the respondent no.5 - Education Officer, Zilla Parishad (Secondary), Kolhapur as well as the affidavits filed by

respondent nos.1 and 2. Mr.Dalvi has placed on record some documents and so also the Education Officer who is present in the Court has submitted some documents through the learned AGP.

2. The present appellant had joined as an Assistant Teacher with effect from 19/6/1990 at the Sonyachi Shiroli High School run by the defendant no.1 i.e. the present respondent no.3 - Institution as an unaided school. There is no doubt that he was eligible for appointment as an Assistant Teacher. As per the resolution dated 9/6/1996 he was promoted to the post of Head Master of the very same school with effect from 1/6/1996 and the said High School was unaided even as on that date. He filed Special Civil Suit No.512 of 1999 for a declaration that he is confirmed in the post of Head Master and, therefore, entitled for the difference in salary i.e. Rs.53,216/-. He claimed that the proposal for granting an approval in his favour was submitted on 10/9/1996 and the defendant no.2 - Education Officer (Secondary) had returned the same on 5/12/1996. He further claimed that in the academic year 1996-97, 1997-98 and 1998-99 he worked as Head Master of the said school which was given 25 per cent grant in the

year 1996-97, 50 per cent in the year 1997-98 and 75 per cent in the year 1998-99. It became a fully aided high school in the academic year 1999-2000. It appears that though the defendants were issued notices, none of them appeared before the trial Court and the suit was decided ex-parte by the learned Second Jt.Civil Judge, Senior Division at Kolhapur on 9/8/2000. The suit was decreed in the following words:

> Unless this ex-parte decree is applied to be set aside, it is declared that defendant no.2 has to sanction for payment to the plaintiff the difference in salary within the relevant period of Rs.53,216 and further upto the date of decision of this suit, in terms of prayer clause."

3. The above preliminary decree was challenged by the present respondent nos.1 and 2 by filing Regular Civil Appeal No.465 of 2001 and they pointed out that after the decree was passed, the Education Officer granted approval in favour of the plaintiff for the post of Head Master with effect from 1/6/1996. They claimed that the ex-parte decree was obtained

fraudulently and by way of collusion between the plaintiff and the defendant no.1 - Institution. The appeal was filed belatedly and the delay was condoned by the lower Appellate Court. The learned 3rd Ad-hoc. Addl. District Judge, Kolhapur by his judgment and order dated 15/1/2005 held that the rights of the appellants were adversely affected by the ex-parte decree passed in Civil Suit No.512 of 1999, the plaintiff was not entitled for declaration that he was confirmed on the post of Head Master. However, the lower Appellate Court held that the plaintiff was entitled for the difference in salary i.e. an amount of Rs.53,216/-. The decree passed by the trial Court was modified as under :

> "Defendant nos.1 and 2 i.e., respondent no.2 and 4 do pay the differences in the salary to the plaintiff from the period of 1/6/1996 to November, 1999 as per Rule only."

. The above quoted decree passed by the lower Appellate Court does not indicate and it does not imply by any stretch of imagination that the lower Appellate Court approved the appointment of the plaintiff to the post of Head Master. It clearly

stated that the difference in salary will have to be paid as per the rules only. It is also pertinent to note that before both the Courts below none of the parties raised the question of maintainability of the suit in view of the implied bar inasmuch as the remedy for resolving the dispute of promotion being available under Section 9 of the MEPS Act, 1977 by filing an appeal before the School Tribunal.

4. In the case of Satyawadi Ganpartrao Pimple vs. Aruna Ganpatrao Narwade **[2000 (2) Mh.L.J. 322]** I had taken a view that the jurisdiction of the Civil Court was impliedly barred by virtue of the provisions of Section 9 of the MEPS Act and the said issue along with some other issues fell for consideration before the Full Bench of this Court on a reference being made in Second Appeal No.533 of 2001 with Civil Application Nos.1437 of 2003 and 1446 of 2006. The Full Bench answered the first issue in the following words:

> "In respect of those matters upon which an appeal lies to the Tribunal under clauses (a) and (b) of sub-section (1) of Section 9 of the MEPS Act, 1977, the jurisdiction of the Civil

Court is impliedly barred."

5. In the instant case when the suit was decreed ex-parte, the decision rendered by me in Satyawadi Ganpatrao Pimple's case (Supra) was reported but it appears that none of the parties pointed out to either of the Courts below the said decision and pleaded that the suit was not maintainable when admittedly the issue of promotion is covered by an appellate remedy under Section 9 of the MEPS Act, 1977. The Full Bench having confirmed the said view in the case of St. Ulai High School and anr. Vs. Shri Devendraprasad Jagannath Singh and anr. **[2007 (1) Mh.L.J. 597]**, the suit filed by the appellant was not maintainable.

6. Having regards to this well settled position in law, I had directed the Education Officer, (Secondary), Zilla Parishad, Kolhapur to file an affidavit-in-reply for verifying the record and after examining the issue of seniority of the plaintiff-appellant, respondent nos.1 and 2 and other eligible teachers. In para 4 of the affidavit-in-reply it has been clearly admitted that when the appellant was appointed as Head Master as

per the resolution dated 9/6/1996, the present respondent nos.1 and 2 were senior to him and eligible for being considered for the very same post. However, it has been pointed out that in the year 1996 both of them had given in writing before the then Education Officer (Secondary), Zilla Parishad, Kolhapur that they were willing to accept the Head Mastership of an aided secondary school and this would impliedly mean their unwillingness to work as Head Master of unaided secondary school. The Education Officer who is present before me today has placed some documents on record. The respondent nos.1 and 2 appear to have given in writing to the Education Officer on 26/11/1996 stating that they were willing to be promoted to the post of Head Master of an aided high school. The record also indicates and which has been admitted by the respondent no.1 in his affidavit-in-reply that he was appointed as Acting Head Master of the High School at Shirgaon with effect from 9/12/1996 and he has clarified in his affidvit-in-reply in this second appeal that inspite of he being eligible for being appointed to the post of Head Master he was continued as acting Head Master for a period of about three years and, therefore, he finally gave in writing on

1/11/1999 to relieve him from the post of Acting Head Master. This letter dated 1/11/1999 cannot be accepted as the unwillingness given by the respondent no.1 to accept the promotion for the post of Head Master. Mr.Dalvi, the learned counsel for the management has pointed out that on the basis of the representation made by some teachers on or about 13/10/2000, the Deputy Director heard the teachers as well as the management and by his order dated 18/9/2000 directed that Shri Dhanaji Patil being the senior most Assistant Teacher was to be appointed as Head Master but on account of his alleged resignation, there was some problem and, therefore, one post of Head Master was directed to be kept vacant till the said issue was resolved. Shri Tanaji Jadhav (present respondent no.1), Shri M.B. Nalawade and Shri Krishnakant Patil were directed to be appointed as Head Masters against the three posts in the open category. Shri S.M. Kamble was directed to be appointed to the post of Head Master against a post reserved for S.C. and for the second reserved post of N.T. there was no candidate qualified and, therefore, it remained vacant. There is no dispute that the defendant no.1 - management i.e. the present respondent no.3 runs six high schools and all

of them are fully aided. The seniority of teachers will have to be, therefore, common for the entire institution and not high schoolswise. In view of the claims and counter-claims made by the plaintiff, the management, the respondent nos.1 and 2 and the affidavit-in-reply filed by the Education Officer, it appears imminently necessary that the issue of appointment to the post of Head Master right from June 1996 will have to be adjudicated upon by the School Tribunal and the decree passed by the trial Court and modified by the lower Appellate Court is a nullity so far as it relates to the issue of promotion of Head Master. This second appeal, therefore, does not involve any substantial question of law and it has to fail at the threshold.

7. Appeal is, therefore, dismissed in limine and the respective parties are left with the remedy of filing an appeal under Section 9 of the MEPS Act, 1977 before the School Tribunal. If such an appeal is filed within a period of eight weeks from today, it is directed to be expedited. In the mean while status quo as of now shall be maintained and it is made clear that the appeal to be filed by any of the parties will have to be decided by the School

Tribunal on its own merits and without being influenced by the observations made in this order.

8. Civil application does not survive and the same stands disposed as such.

(B.H.MARL